

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
www.montgomerycountymd.gov/content/council/boa/index.asp

(240) 777-6600

Case No. A-6437

PETITION OF MIKHAIL LUKAVSKI

OPINION OF THE BOARD
(Opinion Adopted July 30, 2014)
(Effective Date of Opinion: August 21, 2014)

Case No. A-6437 is an application by Mikhail Lukavski for variances to locate a shed in the side yard. The existing shed requires an eleven-foot variance from the 12-foot side lot line setback required by Section 59-C-1.326(3)(C), as well as a variance from the requirement in Section 59-C-1.326(a) that accessory structures be located in the rear yard.

The subject property is Lot 9, Block D, Countryside Subdivision located at 2233 Countryside Drive, Silver Spring, Maryland, 20905, in the R-200 Zone.

The Board of Appeals held a hearing on the application on July 30, 2014. Mikhail Lukavski appeared and testified.

Decision of the Board: Requested Variances Denied.

EVIDENCE PRESENTED

1. Mr. Lukavski stated that his back yard is too steeply sloped to locate a shed there. He stated that the yard drops approximately eight feet from the rear property line and that he installed a four-foot retaining wall in his back yard at the base of the hill.
2. Mr. Lukavski stated that he installed the shed for more attractive storage of trash and recycling containers and tools.

3. He stated that when he installed the shed, he did not know that a permit was required to do so.
4. In response to Board questions, and referring to Exhibit 4(a), Mr. Lukavski stated that he built an addition onto the back of his house, on the east side, with a deck.

FINDINGS OF THE BOARD

A variance permits a structure that otherwise would not be permitted by the zoning ordinance, which has led the Maryland Court of Special Appeals to clarify that "the authority to grant a variance should be exercised sparingly and only under exceptional circumstances," *Cromwell v. Ward*, 102 Md. App. 691, 703, 651 A.2d 424, 430 (1995). Review of a variance application under an ordinance like Montgomery County's involves a two-step process to discern a unique characteristic of the property and then to determine whether a practical difficulty results from the uniqueness of the property:

The first step requires a finding that the property whereon structures are to be placed (or uses conducted) is -- in and of itself -- unique and unusual in a manner different from the nature of the surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning provision to impact disproportionately upon that property. Unless there is a finding that the property is unique, unusual, or different, the process stops here and the variance is denied without any consideration of practical difficulty or unreasonable hardship. If that first step results in a supportable finding of uniqueness or unusualness, then a second step is taken in the process, i.e. a determination of whether practical difficulty and/or unreasonable hardship, resulting from the disproportionate impact of the ordinance caused by the property's uniqueness, exists.

Cromwell, 102 Md. App. at 694-695, 651 A.2d at 426. That the variance might allow an improvement to property that is "suitable or desirable or could do no harm or would be convenient or profitable to its owner" does not provide a basis for granting a variance. *Cromwell*, 102 Md. App. at 707, 651 A.2d at 432. The need for the variance must arise from the application of the zoning ordinance to the unique or peculiar characteristics of the property. See *Cromwell*, 102 Md. App. at 717-718, 651 A.2d at 437. The zoning ordinance must impact upon the land in a unique manner that does not exist where a restriction applies "equally to all lots of similar size." *Cromwell*, 102 Md. App. at 720, 651 A.2d at 438.

In Salisbury Board of Zoning Appeals v. Bounds, 240 Md. 547, 554-55, 214 A.2d 810, 814 (1965), the Maryland Court of Appeals agreed with 2 Rathkopf, The Law of Zoning and Planning, 48-1, that,

If the peculiar circumstances which render the property incapable of being used in accordance with the restrictions contained in the ordinance have been themselves caused or created by the property owner or his predecessor in title, the essential basis of a variance, i.e., that the hardship be caused solely through the manner of operation of the ordinance upon the particular property, is lacking. In such a case, a variance will not be granted; the hardship, arising as a result of the act of the owner or his predecessor, will be regarded as having been self created, barring relief.

See also Montgomery County, MD v. Frances Rotwein, 169 Md. App. 716, 733, 906 A.2d 959, 968-9 (2006) ("the 'hardships' about which Rotwein complains are self-created and, as such, cannot serve as a basis for a finding of practical difficulty. See *Cromwell*, 102 Md. App. at 722. Rotwein contends that the requested location for her garage is the only feasible location. But that is so only because of the location of the other improvements to the property, and the decision whether to build those improvements and where to place them was Rotwein's.").

Section 59-G-3.1 of the Montgomery County Zoning Ordinance ("Authority – Board of Appeals") provides that the Board of Appeals may grant petitions for variances, as authorized in Section 59-A-4.11(b), upon proof by a preponderance of the evidence that:

- (a) By reason of exceptional narrowness, shallowness, shape, topographical conditions or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property;

1. It is under the first subsection that the Board must employ the analysis from the *Cromwell* and *Salisbury* cases, set forth above. The Board notes that the steep slope constrains construction in the subject property's current rear yard. At the same time, the Board notes that the addition and deck that Mr. Lukavski added to the rear of his house contribute to that constraint by diminishing the area between house and the retaining wall. Thus the Board finds that the hardship or practical difficulty that Mr. Lukavski asserts occurs is, to a significant extent, a result of his own actions and therefore self-created, and is not caused "solely through the manner of operation of the ordinance upon the particular property," as *Salisbury* requires. Therefore the Board finds that the application fails to meet the requirements of Section 59-G-3.1(a), and the variances must be **denied**. Because the application does not meet the threshold requirements of Section 59-G-3.1(a), the Board did not consider its conformance with subsections (b)-(d).

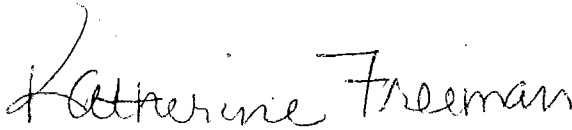
On a motion by Catherine G. Titus, Chair, seconded by David K. Perdue, Vice-Chair, with John H. Pentecost, Carolyn J. Shawaker and Stanley B. Boyd in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.



Catherine G. Titus
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
This 21st day of August, 2014.



Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.